

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

77-4162

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CROSS-SOUND FERRY SERVICES, INC.,)

Petitioner,)

v.)

THE UNITED STATES OF AMERICA and)
INTERSTATE COMMERCE COMMISSION,)

Respondents.)

No. 77-4162

(Petition for Review Of
A Decision Of The Inter-
state Commerce Commission)

OPENING BRIEF OF PETITIONER AND
INCORPORATED VILLAGE OF GREENPORT, THE
BRIDGEPORT AND PORT JEFFERSON STEAMBOAT
COMPANY AND SHELTER ISLAND AND GREENPORT FERRY CO.

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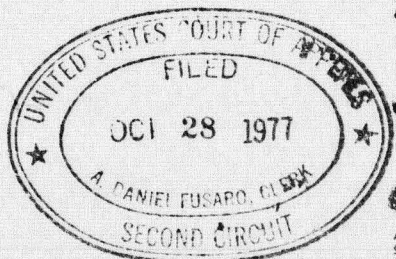
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STATEMENT OF ISSUES
PRESENTED FOR REVIEW

1. Did the Interstate Commerce Commission (the "ICC") act contrary to law when it repeatedly permitted an applicant for water carrier operating authority to introduce post-hearing evidence while denying protestants permission to introduce evidence offered at the same time as or before that of applicant?
2. Did the ICC's treatment of this case comply in all respects with the requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §4321, et seq.?
3. Did the ICC act contrary to law when it granted operating authority to a carrier in the absence of substantial evidence that such carrier was, or would ever be, able to provide the service proposed?

STATEMENT OF THE CASE

A. Procedural Background.

This case arises from a petition for review of orders of the Interstate Commerce Commission ("ICC") served on October 22, 1975, November 19, 1976, June 16, 1977 and August 29, 1977 in its Docket No. W-1270, Mascony Transport and Ferry Service, Inc., Initial Operations - New London to Greenport, L.I., New York. Only the order served November 19, 1976, is reported (353 I.C.C. 60).

The orders under review purport to grant an application of Mascony Transport and Ferry Service, Inc. ("Mascony") seeking a grant of operating authority pursuant to the provisions of section 309(c) of the Interstate Commerce Act, 49 U.S.C. §909(c).

By application filed May 29, 1973, Mascony sought authority:

to engage in operation, in interstate or foreign commerce, as a common carrier by water in the transportation of general commodities and passengers by self-propelled vessels, between the ports of New London, Conn., and Greenport, Long Island, N.Y.;

Protests were duly filed by several parties including New London Freight Lines, Inc., ("NLFL") the predecessor in interest to Cross-Sound Ferry Service, Inc. ("Cross-Sound"),

petitioner before this Court.^{*/} Cross-Sound filed the petition by which this review proceeding was instituted.^{**/}

The application was assigned for oral hearing and hearings were held before Administrative Law Judge David H. Allard at New London, Conn. on October 29, 30 and 31 and November 1, 1973 at Greenport, N.Y. on December 10, 11, 12 and 13, 1973 and January 8, 9 and 10, 1974 and at Washington D.C. on February 20, 1974.

By order served March 26, 1974, the record in these proceedings was closed as of March 19, 1974 and the due date for filing briefs was set at May 6, 1974. By order of May 1, 1974, that date was later extended to May 23, 1974. As unauthorized appendices to its brief, applicant submitted

^{*/} While this proceeding was pending on exceptions the Commission, in Finance Docket No. 27846, authorized transfer to Cross-Sound of that portion of the operating authority of NLFL whereby NLFL was authorized to provide service between New London, Conn., and Orient Point, N.Y. That transaction was consummated on May 23, 1975, and Cross-Sound has been providing service under such acquired authority continuously since that date. On November 21, 1975, Cross-Sound duly filed a motion to have itself substituted as a party in this proceeding as successor in interest to NLFL. As explained in that motion, Cross-Sound did not request such formal substitution any earlier since it was awaiting issuance of its certificate before doing so. Cross-Sound's motion for substitution was granted in the Commission's order served November 19, 1976.

^{**/} The other parties on whose behalf this joint brief is submitted were also parties in the proceedings below. The Bridgeport & Port Jefferson Steamboat Company ("B&PJ") was a protestant. Shelter Island and Greenport Ferry Co., ("SI&G") and Incorporated Village of Greenport ("VG") intervened at an early stage of the proceedings.

evidentiary material (J.A., Doc. 184) and on June 10, 1974, NLFL and B & PJ filed a joint motion to strike such material or, in the alternative, to reopen the record for receipt of further evidence in response to that submitted by applicant. J.A., Doc. 186.

On June 19, 1974, the ICC served the Initial Decision of Judge Allard denying the application due to the failure of the applicant to present for the ICC's consideration a proposal which was operationally feasible or environmentally sound. J.A., Doc. 188. By letter dated June 21, 1974, the Deputy Director of the ICC's Section of Operating Rights advised that the Initial Decision denying the application had rendered moot protestants' motion to strike the material appended to applicant's brief and that the motion would not be acted upon. J.A., Doc. 190.

On August 19, 1975, Mascony filed exceptions to Judge Allard's decision and petitioned the ICC to reopen the record for receipt of additional evidence which it appended to its exceptions and which was intended to correct basic omissions in its case. J.A., Doc. 207. Responses were filed by protestants to applicant's exceptions and petition on September 30, 1974, urging that the Initial Decision be affirmed and that the additional unauthorized evidentiary material be rejected.

Nothing further occurred in the case until thirteen months later when, on October 22, 1975, the ICC issued an order reopening the record: (1) to receive the evidentiary material that had been appended to applicant's exceptions to the Initial Decision; (2) to receive into evidence in this proceeding unverified representations of applicant contained in the record of a summary proceeding for temporary operating authority^{*/}; and (3) to consider the environmental consequences of applicant's proposal. J.A., Doc. 249. On November 21, 1975, Cross-Sound and B & PJ filed a petition for reconsideration of the ICC's order of October 22, 1975, or, as an alternative, an opportunity to cross-examine on and respond to the additional material received in evidence. J.A., Doc. 282.

On February 3, 1976 the ICC issued a draft environmental impact statement based upon ex parte communications with applicant and others. The statement invited comments on or before March 22, 1976, and such comments were filed by, among others, applicant and the protestants and intervenors on whose behalf this joint brief is submitted. In their joint comments Cross-Sound and B & PJ pointed out that many

^{*/} The application for temporary authority (Docket No. W-1270, Sub No. 2 TA) in which the ICC gave consideration to the changed circumstances which it has refused to consider in this case (i.e., sharp reduction in demand due to the energy crisis, service improvements by Cross-Sound, etc.), was denied.

of the conclusions in the draft statement were based upon inaccurate information which presumably had been furnished to the ICC staff by applicant and which protestants had no opportunity to test by cross-examination. On June 11, 1976, the ICC issued its final environmental impact statement which continued to rely upon the misinformation which protestants had shown in their comments to be seriously at odds with the actual facts. The final environmental impact statement made no provision for any further comment, petition, or other action by any of the parties.

On November 19, 1976, the ICC served a decision of Division 1 reversing the Initial Decision and providing for a conditional three year grant of authority. J.A., Doc. 324. The decision was by a 2-1 vote of the Division with Chairman Murphy filing a vigorous dissent. In addition to the conditional grant of authority the majority opinion granted Cross-Sound's motion to be substituted for NLFL which had been pending for more than a year but denied Cross-Sound's request for an opportunity to cross-examine on or submit evidence in response to the late-filed evidence of applicant on the extra-record material which had been filed in Docket No. W-1270 (Sub No. 2 TA).

On December 20, 1976 protestants filed petitions for reconsideration of the majority decision to which applicant

replied on January 10, 1977. Applicant also submitted an unauthorized "Supplemental Reply" on February 1, 1977. On February 8, 1977, Cross-Sound filed a motion to strike the unauthorized supplemental filing.

By order served April 8, 1977, the ICC denied all petitions for reconsideration and Cross-Sound's motion to strike but reopened the record for receipt of further evidence relating only to applicant's docking, staging, and loading sites at Greenport, New York and New London, Connecticut. J.A., Doc. 356. Pursuant to that order applicant, on April 28, 1977 filed the verified statement of its President, describing the most recent version of its plan of operation. J.A., Doc. 357. On May 17 through May 19, 1977, the parties on whose behalf this brief is filed as well as the New York State Department of Transportation, the Association of Businessmen of Greenport, the East End Supply Company, and Henry J. Mitchell and Pauline Mitchell (the owners of the property that applicant proposes to use as its Greenport terminal) filed affidavits describing the deficiencies inherent in applicant's latest plan of operation.

On May 20, 1977 the National Railroad Passenger Corporation ("Amtrak") submitted a letter to the Commission requesting an extension of time in which to submit a reply to applicant's

latest proposal. By letter of May 23, 1977, the request was denied on the grounds that Amtrak was not a party to the proceeding. On June 7, 1977, Amtrak filed a petition for leave to intervene and to file a verified statement (which it appended) of its expert on grade-crossings explaining the extremely hazardous conditions which would be created by applicants' most recent plan of operation. J.A., Doc. 374. On June 16, 1977 the ICC served an order denying Amtrak's request to intervene and again found that applicant should be granted a three year term certificate. J.A., Doc. 378.

On July 12 through 18, 1977, petitions for reconsideration of the Commission's order of June 16 were filed by the parties on whose behalf this brief is submitted as well as Amtrak, Henry J. Mitchell and Pauline Mitchell, and the Association of Businessmen of Greenport. On August 1, 1977 the U.S. Department of Transportation ("DOT") filed petitions for leave to intervene and for leave to submit a late-filed petition for reconsideration (which it appended) for the purpose of bringing to the Commission's attention the serious safety hazard that would be created by applicants' most recent plan of operation at New London. J.A., Docs. 391 and 392.

By order served August 23, 1977 the ICC denied the petitions for reconsideration of its order of June 16 and

the petitions of DOT.^{*/} J.A., Doc. 396.

On September 6, 1977 and September 12, 1977, respectively, Cross-Sound and Amtrak filed petitions requesting a finding that the proceeding presented an issue of general transportation importance. On September 6, 1977 Cross-Sound also filed a petition with the ICC requesting that the effectiveness of its order be stayed pending appeal. On September 22, 1977 the ICC issued orders denying the requests for a finding of general transportation importance^{**/} and the request for stay of the orders. A Motion for Stay was then submitted to this Court and denied on October 4, 1977.

B. Applicant's Proposal.

As has been noted, this case arises from a request by Mascony for ICC authorization to operate a ferry service between New London, Connecticut and Greenport, New York. The operation was conceived by George R. Power, Mascony's president, during his seasonal employment as a deck hand on a NLFL vessel during the summer months of 1971 and 1972. J. A., Hearing Transcript, pp. 24-30. Mr. Power was apparently impressed by the conditions which prevailed during his

^{*/} The order indicated that Commissioner Stafford would have granted the intervention of DOT and received its late-filed statement.

^{**/} Chairman O'Neal and Commissioner Brown voted to deny the GTI petitions but to reopen the proceeding and accept and consider the petitions for intervention and DOT's petition for reconsideration. Commissioner Murphy voted to grant the petitions.

brief tenure as a result of handicaps under which NLFL was then operating but which were later corrected. These included the fact that the threat of a cross-sound bridge had caused NLFL's management to delay its plans for construction of new vessels. Also, due to NLFL's inability to immediately locate a suitable replacement for a vessel which had to be removed from service, its fleet had been reduced temporarily from three vessels to two. J.A., Hearing Exhibits 93, pp. 5-6 and 102, p. 2.

In November of 1972 Mr. Power negotiated with the Delaware River and Bay Authority for the purchase of S. S. NEW JERSEY, a vessel which the Authority was replacing. The vessel was purchased for \$350,000 in March 1973. The S. S. NEW JERSEY is a steamboat built in 1906. It still is powered by its original steam engines. At an operating speed of 12 knots the S. S. NEW JERSEY would burn some 6,000 gallons of fuel oil per 16 hour operating day. At the higher speeds assumed by Mascony in its proposed concept of operation, consumption would be substantially higher in the range of 8,000 gallons per 12 hour operating day.* / The vessel has a licensed capacity of 100 cars and 800 passengers. Mascony also had an option to purchase three other vessels from the

* / Mascony's plan of operation calls for speeds of up to 22 knots. J.A., Hearing Transcript, p. 129.

Delaware River And Bay Authority which were also being replaced by modern, diesel-powered vessels. As of the close of hearings Mascony did not have a certificate of inspection of the vessel from the Coast Guard which is a prerequisite to its operation. J.A., Hearing Transcript, pp. 29-30, 63, 66, 2453 and 2521; Hearing Exhibits 20, 23, 101 and 108.

Mascony originally proposed to use as the site of its New London terminal a parcel of waterfront property known as the DeNoia property. In its petition for leave to intervene the Connecticut Department of Transportation described the proposed use of that property as "a very serious hazard to the members of the travelling public." J.A., Hearing Transcript, pp. 93-97; Hearing Exhibit 33; Doc. 118.

After service of the Initial Decision denying the application in part because of the inherent danger of the proposed New London terminal site, applicant tendered with its exceptions to the Initial Decision evidentiary materials purporting to show that it had shifted its proposed terminal site from the DeNoia property to the New London Municipal Pier. J.A., Document 207, Appendices C & D.

When the City of New London made a determination that it would not further extend Mascony's option to use the Municipal Pier, Mascony on April 28, 1977 announced for the

first time its intention to use the so-called "Kellems" property which is adjacent to the DeNoia property at which the terminal was originally to be located. As with applicant's original proposal, use of the Kellems site would have passengers and vehicles moving directly off of applicant's ferry vessel onto the high speed Amtrak tracks which run between Boston and New York. This is an unguarded crossing which because of track curvatures and location of adjacent structures provides very poor visibility. J.A., Docs. 357 and 374.

On the Greenport side applicant proposed to dock its vessel in the confined harbor of Greenport. Since Mascony's vessel is not equipped with bow thrusters or any comparable navigational aids, its negotiation of the harbor would be hazardous to the numerous small recreational vessels which normally fill the harbor. The proposed docking plan would also place the Mascony vessel in a position which would interfere with the operation of the Shelter Island & Greenport Ferry on which the residents of Shelter Island rely for access to emergency medical and other services.*/ J.A.,

*/ The Administrative Law Judge who presided at the hearing took particular note in his Initial Decision of applicant's failure to fulfill its assurance that it would bring its vessel into Greenport harbor in order to provide an opportunity to evaluate the feasibility and impact of such a maneuver. J.A., Doc. 188, p. 11.

Hearing Transcript, pp. 1691, 1693, 1695, 1700-1701, 1704-1707; Doc. 365.

Applicant's proposed Greenport terminal site is located on property as to which applicant's access is presently in dispute in the New York State Courts. J.A., Doc. 359. The latest version of applicants' traffic plan also calls for traffic lanes which run through an existing motel building which applicant has no right to alter or demolish. The plan also calls for the movement of large volumes of traffic over underground fuel tanks and municipal sewer systems which could not withstand the weight and vibration to which they would be subjected. The plan also calls for movement of traffic through already congested streets which the New York State Department of Transportation has determined to be clearly inadequate for such purpose. J.A. Docs. 361, 362, 363, 364 and 366.

C. Nature Of Opposition To Applicant's Proposal By The Parties On Whose Behalf This Brief Is Submitted.

The opposition of VG to the proposal is predicated solely upon the negative environmental and safety consequences that would unavoidably flow from its implementation. VG takes no position for or against any particular ferry operation. It is simply opposed to operations of the type proposed by Mascony within the Village of Greenport.

Similarly SI&G is opposed to the Mascony proposal solely because of the fact that Mascony's operations would seriously interfere with SI&G's longstanding operations with regard to vessel movement and traffic flow onto and off its vessels.

Cross-Sound and B & PJ oppose the application for competitive reasons. It is their position that requirements for ferry services across Long Island Sound are currently being fully satisfied by existing services. Cross-Sound, in particular, believes that the available traffic will not support duplicative services. Therefore, what is at issue in this case is not whether there should be additional competition but, instead, whether Mascony's services should be substituted for that of Cross-Sound. Both services cannot survive if parallel operations are authorized. Cross-Sound believes that the ICC's failure to recognize the economic reality of the situation and its treatment of the matter as a routine carrier licensing proceeding caused it to commit the fundamental errors which are the basis of this petition for review.

ARGUMENT

- A. The ICC's Selective Admission Of Applicant's Evidence After The Close Of The Record In This Proceeding While At The Same Time Denying Admission Of Protestants' Evidence Was Arbitrary, Capricious And An Abuse Of Discretion.

The ICC consistently reopened the post-hearing record in this case to receive evidence favorable to applicant and, with equal consistency, refused to receive evidence tendered by protestants. This was arbitrary, capricious, an abuse of discretion, and indeed a denial of due process of law. This Court must correct such wrongdoing by setting aside the orders of the ICC granting operating authority to Mascony.

We recognize that supplementation of a record is a matter generally entrusted to agency discretion. The classic statement of that principle appears in ICC v. Jersey City, 322 U.S. 503, 514-515 (1944) where Justice Jackson wrote:

"If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening. It has been almost a rule of necessity that rehearings were not matters of right, but were pleas to discretion. And likewise it has been considered that the discretion to be invoked was that of the body making the order, and not that of a reviewing body."

See also, Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 294-295 (1974) and United States v. ICC (Northern Lines Merger Cases), 396 U.S. 491, 520-521 (1970).

This discretion, however, is not unbridled. Where significant relevant events take place which render the record outdated, the record may not be acted upon without updating. Atchison, T. & S.F. Ry. v. United States, 284 U.S. 248, 260 (1932). Furthermore, and even more important to the disposition of this case, if an agency does update a record, it must do so "in a manner that is fair to all concerned." Delta Airlines, Inc. v. CAB. _____ F.2d _____ (D.C. Cir. No. 76-1241, decided June 23, 1977, slip op. at 42).

The actions of the ICC in the case here under review were anything but fair. Rather, they operated solely to benefit applicant and to harm protestants. The ICC repeatedly permitted applicant to introduce new evidence to buttress its case, but uniformly denied petitioner and its supporting intervenors the same opportunity, despite repeated efforts by them to do so.

The unfairness of this action is nowhere better illustrated than in the ICC's action with regard to the evidence that was tendered along with the exceptions to the administrative law judge's initial decision denying the application and

petition to reopen. J.A., Doc. 207. The ICC permitted this evidence to be admitted, on the ground that the evidence reflected "changed circumstances with respect to applicant's use of facilities at New London," despite the fact, as pointed out by Cross-Sound's predecessor in its reply to exceptions, that the documents were the subject of direct factual dispute, particularly as regards the availability of a terminal site at New London. J.A., Doc. 221, p. 25. Cross-Sound then petitioned (J. A., Doc. 282, pp. 15 and 16) to introduce evidence, also constituting "changed circumstances", showing:

1. The sharp decline in vehicular traffic moving by ferry across Long Island Sound that occurred immediately following the close of hearings due to the sharp increase in gasoline prices;
2. The greatly expanded year-round sailing schedule of Cross-Sound which had totally eliminated the waits which had been experienced during summer weekends in past years;
3. The reservations system and other innovative service improvements that had been instituted by Cross-Sound;
4. The new high speed vessels to be built specifically for service between New London and Orient Point, the first of which was already under construction; and
5. The new terminal facilities to be constructed under a \$200,000 grant from New York State.

That petition was not even acted upon until nearly a year later when the ICC denied it in its order of November 19, 1976. However in that very same order as a basis for granting the application, the ICC found that:

- "The number of passengers may very well increase significantly if the application is granted, thereby providing sufficient volume to maintain both operations;" J.A., Doc. 374, p. 69.
- "We believe the users of the ferry service should have available to them use of a ferry throughout the year....a grant of authority to a water carrier willing to operate throughout the year should be an economic boon to this area;" J.A., Doc. 374, p. 69.
- "We believe it was incumbent on (NLFL) to make some effort to improve its service beyond merely planning for the construction of new vessels." J.A., Doc. 324, p. 70.
- "The proposed use of a reservation system by applicant should to a long way in alleviating...long waits. A person desiring to use applicant's service would be able to call ahead to reserve a place on the ferry and arrive in time on board." J.A., Doc. 324, p. 68.

Thus, while "changed circumstances" was a sufficient ground for admitting evidence favorable to applicant, the ICC arbitrarily found it to be insufficient when protestant's evidence was involved.

The ICC, as ground for refusing to receive Cross-Sound's evidence, admitted that "such evidence might provide assistance in making an optimum decision." J.A., Doc. 324, p. 63. However, it stated:

"...the length of time already consumed by this proceeding must be given consideration. There comes a time when litigation must end and a decision on the merits must be rendered. [citing ICC v. Jersey City, 322 U.S. at 514].

It is unfortunate that we were forced to reopen this proceeding once due to our own failure initially to institute environmental review. This does not, however, warrant a second reopening with further delay in the ultimate decision." [emphasis supplied]

Thus, the ICC acknowledged that the delay involved was attributed to it rather than to any protestant. However, it then proceeded to use the delay which it had itself created as the sole ground for denying Cross-Sound the same opportunity to present its evidence of "changed circumstances" that had been afforded to applicant.

This, however, was not the end of the ICC's selective updating of the record with evidence favorable to applicant. Although the ICC had already found that the delay had occurred was too great to allow the record to be updated by protestants, it once again afforded Mascony the right it had denied to protestants. Realizing that the prior factual showing by applicant would never pass judicial muster as a satisfactory basis for showing that Mascony could ever operate between Greenport and New London, the ICC yet again reopened the record for the "sole purpose" of allowing applicant to submit "additional evidence in the form of verified statements re-

garding docking, staging, and loading sites at Greenport, N.Y. and New London, Conn." J.A., Doc. 356, p. 2. No similar opportunity was afforded any of the protestants with regard to any updated evidence relating to the need for this service, despite the fact that nearly four years had passed since the application had been filed and circumstances with respect to alleged need had changed during that period at least as much as had circumstances relevant to applicant's ability to provide service.

Amazingly enough, this would not prove to be the end of the ICC's arbitrary refusal to receive any evidence favorable to the protestants while allowing Mascony to submit evidence necessary to meet its statutory burden. Prior to April 28, 1977, the record before the ICC showed that Mascony proposed to use the New London Municipal Pier as its docking facility in that city. However, in the verified statement of George R. Power, submitted in response to the ICC's order served April 8, 1977, it was disclosed for the first time that another New London site would be used, namely the so-called Kellems pier. J.A., Doc. 357, Power V.S., pp. 7-8. This pier opens directly onto the railroad tracks over which National Railroad Passenger Corporation ("Amtrak") operates its high speed trains between Boston and New York. Since those tracks had been acquired by Amtrak subsequent to the

point in time at which Mascony had told the Commission it intended to dock its vessel at the New London Municipal Pier, Amtrak had absolutely no reason to participate in this case prior to announcement of the revised proposal on April 28, 1977. Yet when Amtrak attempted to intervene and present evidence of the serious safety hazards that would result from the new Mascony proposal, the ICC by order served June 16, 1977, refused to allow Amtrak to intervene and present its evidence. Then, by order served August 29, 1977, the ICC also refused to let the U.S. Department of Transportation ("DOT") intervene and present evidence on the same point even though it is the agency entrusted by Congress with primary responsibility for railroad crossing safety between Washington, D.C. and Boston, Mass. See, 23 U.S.C. § 322.

In the case of Amtrak, the ICC stated that "the material it seeks to present has been substantially covered in the environmental impact statement...that no good or sufficient cause appears for again reopening this proceeding at this late date." J.A., Doc. 378, p. 1. With respect to DOT, the ICC merely found "no sufficient or proper cause appears for permitting [DOT] to intervene." J.A., Doc. 396, p. 2. Reliance on such off-hand grounds for denial of leave

to intervene to these important public parties, charged by statute with the matters involved, is yet another example of the arbitrary and capricious conduct of the ICC in dealing with the evidence here involved.

The fact is that the material which Amtrak sought to present was not substantially covered in the environmental impact statement ("EIS"). All that the EIS had to say on this subject was:

"In view of the frequency of train arrivals at the New London station, scheduling around them, particularly during the summer peak, would be difficult. Potential dangers can be mitigated, however, by installation of fail-safe crossing signals and the strategic stationing of attendants along the tracks to keep the tracks clear.

The view from the tracks approaching the station adjacent to the municipal pier is relatively unobstructed and a fail-safe protection device is already in place at the public grade crossing. Mascony also plans to station attendants at the crossing." J.A., Doc. 324, p. 109.

Amtrak's tendered verified statement presented quite a different picture. In said:

"I also determined that the Sparyard Street crossing lacks automatic traffic controlling signals and devices. Too, the crossing surface itself is in deplorable physical condition and is woefully inadequate to efficiently provide for relatively safe and expeditious vehicular and/or pedestrian transit. Moreover, a driver's visibility is obstructed due to the geometric configuration and angle of the crossing, the track curvature in both directions and the buildings located on the Northeast and Southeast quadrants of the crossing." J.A., Doc. 374, Gordon v.s., pp. 2-3.

What the foregoing excerpts demonstrate, but what the ICC, in its determination to grant the application was unable or unwilling to recognize, is that the EIS did not deal with the proposal which was the source of Amtrak's concern. At the time the EIS was prepared, the version of this operating proposal that applicant was then espousing involved use of the New London Municipal Pier as its landing site in Connecticut. As the EIS recognized, this version of applicant's proposal would have had traffic moving across an already heavily used grade crossing in the vicinity of the New London train station. However, on April 26, 1977, Mascony submitted its new plan of operation calling for its use of the so-called "Kellem's pier". It is that new proposal, unveiled for the first time on April 26, 1977, that was the cause of the concern expressed by Amtrak and DOT. Unlike the proposal considered in the EIS, this new proposal involved movement of traffic from the ferry across a presently dormant crossing which "...is in deplorable physical condition...", which is not equipped with any safety control devices, and at which, due to physical and topographic features, visibility is severely obstructed. Yet, consistent with its practice of receiving in evidence only what it wanted to hear, the ICC rejected evidence of those conditions.

Similar evidence which DOT sought to introduce was accorded the same treatment. In its petition for reconsideration submitted to the ICC (J.A., Doc. 392), DOT pointed out that:

"[T]he Sparyard Street crossing is located in the middle of a sharp curve in the tracks which results in reduced visibility in both directions. There are also buildings and other physical objects which further restrict visibility, and the area is along water, which increases the risk of fog and haze. In addition, as the EIS discussed, the Corps of Engineers plans to construct a floodwall alongside the tracks in the near future. This wall would further restrict visibility along the tracks.

In addition to the reduced visibility, the character of Mascony's proposed service would create increased hazards. First, the proposed service would create several periods a day of extremely heavy traffic as each ferry loaded and unloaded. This traffic would be virtually bumper to bumper and could be expected to be stop and go or very slow due to congestion on the narrow New London streets for departing traffic and the need to ascend a ramp and board the ferry for boarding traffic. It should be noted that a second ramp will be added over the Corps of Engineers proposed floodwall which could slow traffic even more. There would thus be several periods a day of up to 100 cars and trucks slowly crossing the tracks bumper to bumper while train traffic approached in low visibility conditions. This slow traffic would greatly increase the risk of traffic being stalled on the tracks due to congestion or mechanical breakdowns. Even with warning gates, this traffic could be trapped on the tracks."

The ICC likewise refused to consider this presentation, opting instead to rely on the superficial, untested analysis set forth in the EIS which had been rendered obsolete when the ICC allowed Mascony to submit yet another new version of its proposal on April 26, 1977.

The ICC's treatment of the attempts of Amtrak and DOT to intervene and submit meaningful evidence about an important safety issue was yet another example of its determination to hear and rely only on evidence favorable to applicant, and to ignore evidence, no matter how convincing, that militated against the granting of the application.

Thus, from the time the hearing was completed until the last order was issued, the ICC on four different occasions either (1) admitted evidence tendered by Mascony or (2) denied admission of evidence tendered by persons opposing the grant of this application. This disparate treatment caused one Commissioner to observe that:

"In these circumstances, there were no reasonable grounds to deny Cross-Sound's request, and failure to honor that request while affording applicant the opportunity to update its own evidence is a serious departure from due process." J.A., Doc. 324, pp. 73-74.

Even more appalling was the ICC's rationale for its refusal to afford a fair opportunity to both sides to update the record. That refusal was based upon the delay--caused solely by its own conduct--which had occurred in the processing of the case. If the ICC were allowed to escape judicial censure for such arbitrary treatment of parties before it by reliance on delay of its own making, judicial review of its actions would be an empty gesture.

Finally, it should be noted that the reliance by the ICC on ICC v. Jersey City as a basis for its disparate treatment of the parties is misplaced.*/ That case dealt with the discretion of an agency to receive any additional evidence following the close of the record. An entirely different situation is presented where an agency reopens the record for one party but denies the same opportunity to that party's adversaries. In that case the agency may not sit back and rely on its discretion as a basis for justifying its conduct.

The controlling proposition is a simple one. As stated by the D. C. Circuit in Delta Airlines, Inc. v. CAB, supra, slip op. at p. 42:

*/ Ironically, the first reference during this proceeding to ICC v. Jersey City appeared in protestants' reply to the evidentiary materials that applicant submitted with its exceptions to the initial decision of the administrative law judge. See, J.A., Doc. 221, pp. 22-23. Significantly, the ICC found the holding of that case unpersuasive with respect to applicant's late-filed evidence. Only when protestants sought to submit additional evidence did the ICC find that case to have merit. In essence, the ICC applied one rule to applicant's request and another to the request of protestants. Such disparate treatment is unlawful. As was stated in Mary Carter Paint Co. v. FTC, 333 F.2d 654, 660 (5th Cir. 1964) (concurring opinion), cert. den., 379 U.S. 957:

"[The] law does not permit an agency to grant to one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case."

"...when an agency chooses to update an administrative record, it must proceed in a manner fair to all concerned. Under certain circumstances, especially where the delay is long, the case close, and the intervening events significant, participation by interested parties may well be indispensable."

There can be no serious dispute that parties are treated unfairly where, as here, a proponent is allowed repeatedly to update the evidence favorable to it while opponents are denied the same opportunity. Since this is precisely what happened in the ICC proceeding here under review, this Court should set aside the orders resulting from such unfair treatment.

B. The ICC's Handling Of This Case Did Not Satisfy The Requirements Of The National Environmental Policy Act Of 1969

In evaluating whether the ICC's action in this case was in accordance with NEPA, the past conduct of the ICC regarding compliance with NEPA is highly instructive. The best that can be said for that conduct is that it has been consistently negative. In a nutshell, the ICC has firmly and consistently resisted change in its procedures to accommodate the requirements and standards imposed by NEPA and has repeatedly refused to comply with such standards until ordered by courts to do so.

The ICC's reticence was first noted by a court in this Circuit in City of New York v. United States, 337 F. Supp. 150 (E.D. N.Y. 1972). There, a statutory three-judge court observed that the ICC had "been slow in reacting to the directive" of NEPA. 337 F. Supp. at 158. This observation is remarkable only in its understatement, since it was not until January 14, 1972, over two years after NEPA became effective, that the ICC promulgated regulations even purporting to implement the NEPA requirements.

This Court, on January 17, 1972, decided the landmark case of Greene County Planning Board v. FPC, 455 F. 2d 412 (2d Cir. 1972) cert. denied, 409 U.S. 849 (1972). The ICC was fully aware of that decision and indeed submitted a

memorandum in support of the FPC's petition for rehearing in which it contended that the decision in Greene County would require it to change its procedures drastically. Moreover, when certiorari was sought in that case by the United States, presumably after consultation with agencies which would be affected by this Court's ruling, it was acknowledged in the petition that Greene County would affect the ICC's procedures. Certiorari was denied in the Greene County case, yet the ICC still did not modify its NEPA regulations.

On August 1, 1973, the Council on Environmental Quality ("CEQ"), over the ICC's protest, promulgated amended guidelines for implementing NEPA, giving effect to this Court's holding in Greene County. Approximately five months later, on December 27, 1973, the ICC petitioned the CEQ to amend its guidelines, arguing that following the guidelines would (1) require a 20 per cent increase in the ICC's staff and (2) hamper the ICC in carrying out its primary function of regulating transportation. This petition was denied by the CEQ in February of 1974.

In the letter of the Chairman of the CEQ to the ICC advising of the denial of this petition, it was suggested that administrative law judges make the initial determination of whether an environmental impact statement should be prepared. If one was required, the hearing could be recessed

until the statement was prepared. The hearing would thereafter resume and the public would then be permitted to participate with respect to the environmental issues, which would then have been sharpened by the impact statement. No action was taken by the ICC to implement CEQ's recommendation.*/
Significantly, if that hearing procedure had been followed, Cross-Sound and its supporting intervenors would not have been subjected to much of the extreme prejudice which is the basis for this appeal.

In Harlem Valley Transportation Ass'n v. Stafford 500 F. 2d 328 (2d Cir. 1974), the ICC was once again ordered to put its NEPA house in order. In that case, this Court ordered the ICC to prepare an environmental impact statement ("EIS") prior to hearings on a rail abandonment proposal. It pointed out that the ICC's NEPA procedures fell woefully short of the requirements of that statute, since no procedures for staff assistance in the preparation of the EIS were provided for.

Shortly thereafter the ICC's NEPA procedures came under fire from a court in the District of Columbia Circuit. In Maine Central R.R. v. ICC, 410 F.Supp. 653 (D.D.C. 1975), the ICC was preliminarily enjoined from holding hearings in

*/ The foregoing summary is based on the historical data set forth in Harlem Valley Transportation Ass'n v. Stafford, 500 F. 2d at 332-333.

connection with certain "control" proceedings relating to Maine Central until NEPA was complied with. In that order the court specifically found that:

"3. The Interstate Commerce Commission's procedures for preparing draft and final environmental impact statements, 49 C.F.R. §§1100.250 et seq., violate the National Environmental Policy Act of 1969, 42 U.S.C. §§4321 et seq., and do not conform with the Guidelines of the CEQ, 40 C.F.R. §§1500 et seq., in that they do not provide for the preparation of draft environmental impact statements prior to public hearings, they call upon private applicants to provide the analysis and factual basis for the Commission's impact statements, and they do not provide a procedural foundation for the Commission's preparation of its own, independent and comprehensive draft environmental impact statement to be available for informed public comment prior to required public hearings.

4. The Interstate Commerce Commission has unlawfully failed to promulgate valid regulations or procedures for the preparation of environmental impact statements, as required by 42 U.S.C. §4332 and recommended in 40 C.F.R. §1500 et seq., despite the clear mandate of judicial decisions. Harlem Valley Transportation Assn. v. Stafford, 500 F.2d 328 (2d Cir. 1974); and Greene County Planning Board v. FPC, 455 F.2d 412 (2d Cir.), cert. denied, 409 U.S. 849, 93 S.Ct. 56, 34 L.Ed.2d 90 (1972)." 410 F. Supp at 656.

The ICC consented to issuance of a corresponding judgment of permanent injunction entered on May 13, 1975. Thus, yet another court found the ICC to have avoided its duties under NEPA.* /

* / The ICC apparently still has not complied with the injunction of the court issued in the Maine Central case. On September 16, 1977 the plaintiff in that case filed a motion to require compliance with the court's judgment on the ground that, after more than two years, the ICC still had not prepared a proper environmental impact statement.

On September 15, 1975, the ICC finally commenced another rulemaking proceeding to implement the requirements of Greene County and Harlem Valley. However, on the first page of the Notice of Proposed Rulemaking it referred to the Supreme Court's holding in Aberdeen & Rockfish R. R. v. Students Challenging Regulatory Agency Procedures ("SCRAP II"), 422 U.S. 289 (1975) and, in a backhanded comment, questioned whether the decision in that case overruled Greene County and Harlem Valley so as not to require any changes in its NEPA regulations. That proceeding was docketed as Ex Parte No. 55 (Sub No. 4), Revised Guidelines for The Implementation of the National Environmental Policy Act of 1969, 350 ICC 492.

Fortunately, the parties to that rulemaking proceeding were able to show the ICC that SCRAP II was of very limited application to the ICC's NEPA functions, since that case involved neither (1) adjudicatory proceedings nor (2) any proposal for action by the ICC. In its decision of June 9, 1976, in Ex Parte No. 55 (Sub No. 4) (352 I.C.C. 451), the ICC explicitly acknowledged the distinction between NEPA's impact on rulemaking and its impact on adjudication. It stated:

"[T]he Administrative Procedure Act requires that decisions in adjudicatory proceedings rest on the evidence of record, and as to such evidence, opportunity for cross-examination should be afforded. Inasmuch as NEPA requires that environmental factors be considered

in the agency review process, the impact statement should be treated as evidence, subject to cross-examination, and be placed in the record along with the other evidence. To ensure this, the final statement should be made available prior to the submission of written verified statements under modified procedure or 15 days prior to the commencement of oral hearings (or at least that portion of the oral hearing concerned with environmental matters). During the adjudicatory process any party will be permitted to challenge the conclusions of the impact statement by offering its own environmental evidence or by requesting cross-examination of Commission witnesses responsible for the preparation of the statement.

This conclusion is not at odds with SCRAP II, because the underlying proceeding in that case was in the nature of a rulemaking, and hearings and cross-examination are not Administrative Procedure Act requirements in rulemaking proceedings." 352 I.C.C. at 460.

The ICC adopted rules which explicitly carried forward this discussion. Section 1108.17(b) of the final rules (49 C.F.R. §1108.17(b)) provided that:

"Any party may take a position, offer probative evidence, and cross-examine witnesses of both the Environmental Affairs Staff (with respect to the preparation of the statement) and the applicant or others (with respect to the environmental information supplied by them), in light of the final EIS and on environmental issues within the scope of the proceeding. The Commission may designate counsel for Environmental Affairs Staff members called as witnesses on environment matters."

These rules specifically provided for submission of the final EIS to the public at least 15 days prior to that portion of the oral hearing relating to the impact statement, except where statutory time periods for decision precluded this. 49 C.F.R. § 1108.16(b). With regard to proceedings then in progress before the ICC, section 1108.3(e) provided:

"Proceedings in progress on the effective date of these regulations shall be governed to the fullest extent practicable by the procedures set forth herein, recognizing, however, that full compliance in all such proceedings may not be possible." [emphasis supplied]

Of course, the statutory requirements of NEPA could not be ignored in pending cases just because these regulations were not adopted until after the commencement of those cases.

The instant case, however, arose during the period when the ICC's regulations were plainly not in compliance with the requirements of NEPA. The application was filed on May 29, 1973 and the hearings took place during October, November and December of 1973 and January and February of 1974. The administrative law judge's decision recommending denial of the application was served on June 19, 1974. That decision denied the application at least partly on environmental grounds pointing out that there was insufficient evidence to determine whether an EIS must be filed.

Thereafter, on October 22, 1975, the ICC ordered that an investigation be made under NEPA of the environmental impact of the proposal. The ICC then proceeded to prepare a draft EIS, which was served on the parties and various federal, state and local governmental agencies on February 3, 1976. Comments were submitted on the draft statement by various parties including petitioner and the Incorporated

Village of Greenport. Subsequently, on June 11, 1976, the ICC released a final EIS, which, it said, was based on "further consultation with governmental officials and other interested persons, and an analysis of the record in this proceeding." J.A., Doc. No. 324, p. 80. No evidentiary proceedings were held with respect to this final EIS.

On November 19, 1976, the ICC served its decision recommending a grant of authority for three years to Mascony. That decision acknowledged that serious environmental questions were raised in the proceedings. Specifically, it noted that:

"The Commission's environmental impact statement raises serious questions as to the effect the proposed operation would have on the environment. The proposed operation would add a substantial volume of traffic to the streets of downtown Greenport during times when traffic levels already exceed design level capacity and a potential safety hazard will be created as a result of the need for ferry-related traffic in New London to cross ConRail tracks to gain access to the landing site. In addition, the introduction of large ferry vessels into Greenport Harbor, which accommodates a large number of small craft in the summer months, could create some safety problems." J.A. Doc. 324, p.70

Notwithstanding the findings in its own EIS, the ICC determined that (1) alleged fuel savings and (2) applicant's assertions of willingness to pursue solutions outweighed the adverse

impact upon the environment.* / In short, it weighed the evidence in the EIS and used that weighing to formulate a basis for its decision.

Thus the ICC grounded a decision to grant authority to Mascony on the assumption that facts contained within an EIS were true, even though the EIS had never been the subject of a hearing or any other proceeding which provided an opportunity to test the accuracy of the data relied upon in its preparation or the validity of the conclusions contained therein. The failure of the ICC to hold a hearing after the final EIS was prepared in this case was contrary to the requirements of both NEPA and the Interstate Commerce Act.

This Court's holdings in Greene County and Harlem Valley made crystal clear one requirement with respect to NEPA procedures, namely that the process of preparing an EIS should be a comprehensive one, with fully objective analysis to be achieved by (1) full participation of the government

* / It said:

"On the other hand, the fuel savings from the proposed operation (projected to be as much as 600,000 gallons annually) could be significant and in our opinion on the whole outweigh the possible environmental damages that could result from authorization of the proposed operation, considering the apparent willingness of applicant to take steps necessary to minimize adverse environmental impacts. Therefore, on the whole we conclude that the proposed operation would not have such a deleterious effect on the environment as to warrant denial of the application." J.A., Doc. 324, p. 70

agencies with responsibilities relating to the subject matter, (2) full participation by the staff of the agency, and (3) full participation by the parties themselves. The goal of this participation is to assure an impartial analysis of environmental issues. While those cases principally dealt with another phenomenon, that of an agency abdicating any responsibility for affirmative development of the final EIS, this case deals with a phenomenon equally debilitating of the goals of NEPA - an agency arrogating the preparation of the EIS to itself and never permitting its conclusions to be subjected to meaningful inquiry by the affected parties. As this Court said in Greene County:

"[S]ince the statement may well go to waste unless it is subject to the full scrutiny of the hearing process, we also believe that the intervenors must be given the opportunity to cross-examine [applicant and agency] witnesses in light of the statement 'Often individuals and groups can contribute data and insight beyond the expertise of the agency involved' CEQ Report, 1 Environmental L. Rep. at 50059" 455 F.2d at 422.

Thus where, as here, the facts contained in the EIS are the basis for an agency's decision, they should be fully as subject to confrontation as were the facts relating to the issues arising under the agency's organic statute.

This is not a case where NEPA is being used as a "Catch 22" impediment to agency action. From its early stages, this case was permeated with environmental considerations.

In a nutshell, what applicant proposed was to operate a massive, antiquated steamboat into a small harbor of a placid, picturesque village, attracting or discharging great volumes of motor vehicles and trucks onto the already overburdened main street of that village, and blocking the ingress and egress of the ferry service which is the critical access of an offshore island community to basic emergency services. It is difficult to conceive of a more appropriate situation for application of NEPA procedures. Notwithstanding, the ICC never once permitted petitioner or its supporting intervenors an opportunity to confront the sources of the evidence in the final EIS, despite the fact that the EIS was the basis for the crucially significant findings that the environmental considerations favored a grant of the operating rights here involved. This was plain error under the applicable NEPA case law.

Even apart from the requirements of NEPA, in adjudicatory licensing proceedings such as this one, where there are material facts in dispute, the parties have a right to confrontation of the sources of the facts and cross-examination of those sources. National Trailer Convoy, Inc. v. United States, 293 F. Supp. 634, 636 (N.D. Okla. 1968). Here the evidence which was relied upon in preparation of the EIS played a significant role in the decision of the

ICC. For example, it found that a totally speculative fuel savings of some 600,000 gallons annually resulting from the commencement of Mascony's ferry service was so important as to outweigh such seriously adverse circumstances as (1) massive traffic congestion in Greenport, (2) a potentially fatal hazard in New London presented by high speed railroad tracks, and (3) a serious threat to the safety of small vessels operating in Greenport harbor. Yet no protestant was ever permitted to confront the source of the conclusion that such a fuel savings would result. This is a material fact, indeed it is a critical fact, which is fully in dispute. Despite that, no opportunity was ever afforded protestants to confront its source and cross-examine it. Such rights to confrontation and cross-examination are the handmaidens of trustworthiness but were nonetheless denied here.

Moreover, the ICC's own NEPA rules required such a hearing. As previously noted, section 1108.17(b) gives the parties to an adjudicatory proceeding in which an EIS is involved the right to cross-examine the witnesses of the applicant, the ICC's staff and others with respect to environmental information supplied by them. Proceedings, such as this one, in progress on the effective date of the ICC rules were required to be governed "to the fullest extent practicable by the procedures set forth" in those

rules. There can be no serious dispute that a hearing could have easily been held on the EIS. There was no barrier to make such a hearing impracticable. Even allowing for a reasonable notice period, it could have been held and completed in a period of a few weeks.

The fact that it had already taken some three years for the case to reach the point of preparation of the EIS was no impediment to such a hearing.*/ "If time was of the essence, the appropriate solution was not to bypass entirely the statutory requirement of hearing, but to structure an expedited hearing." Marine Space Enclosures v. FMC, 420 F. 2d 577 (D. C. Cir. 1969). Such a fundamental violation by the ICC of the applicable statutes, of the case law, and of even its own rules invalidated its grant of authority to Mascony.

In sum, the ICC complied with neither the spirit nor the letter of NEPA when it refused to allow its EIS to be subjected to the scrutiny of cross-examination and confrontation. Accordingly, the ICC's orders granting operating authority to Mascony must be vacated.

*/ This is particularly true in view of the fact that the inordinate delay was solely attributable to the ICC's lethargic handling of the case.

C. The ICC Erred In Granting Authority To Mascony
When There Had Been No Showing That It Was Able To
Perform The Operations.

Petitioner and its supporting intervenors do not deny that, under the Act, the ICC has been vested by Congress with a high degree of discretion which is to be exercised in light of both its expertise and the statutes determining its many duties. However, this discretion is not unbridled, and the courts may evaluate it within prescribed parameters. As one court particularly experienced in reviewing agency action has said:

"A court does not depart from its proper function when it undertakes a study of the record, hopefully perceptive, even as to the evidence on technical or specialized matters, for this enables the court to penetrate to the underlying decisions of the agency, to satisfy itself that the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent."

Greater Boston Television Corp. v. FCC, 449 F. 2d 841 (D.C. Cir. 1970), cert. denied 403 U.S. 923. The Supreme Court, in discussing the standard to be applied by the courts in reviewing actions of the ICC, has held that the agency:

"must exercise its discretion under [the Act] within the bounds expressed by the [applicable statutory standard] . . . And for the courts to determine whether the agency has done so, it must "disclose the basis of its order" and "give clear indication that it has exercised the discretion with which Congress has empowered it." [citations omitted]

Burlington Truck Lines v. United States, 371 U.S. 156,
167-168 (1962).

Section 309(c) of the Interstate Commerce Act, 49 U.S.C. § 909(c), requires the ICC to find that an applicant for operating authority be "fit, willing and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder..." It thus requires that the ICC find that a person seeking operating authority be able, i.e. capable, of performing the service for which operating authority is sought. In the instant case the ICC, while reciting the statutory rubric, did not make a finding as to how this applicant could actually provide the service. Nor, for that matter, could the ICC have made such a finding on the record that was before it.

A look at the state of that record is illuminating, particularly with respect to Mascony's proposed Greenport terminal. The evidence showed clearly that Mascony had no clear right to any land which would permit its vessel to dock in Greenport. In short, it had (and has today) no assurance of a suitable place to operate from in Greenport. In the absence of any evidence of such a place, the ICC could not validly find, as it was required to under section

309(c), that Mascony was "able" to provide the service for which authority was sought.

The ICC itself has consistently recognized that, in order for there to be a grant of authority to a carrier, there must be a showing by it that the proposed operations will be feasible, both logistically and economically. Western Auto Transports, Inc. Extension - Lumber, 72 M.C.C. 346 (1957); Stone Lines, Inc., Contract Carrier Application, 54 M.C.C. 310 (1952); Cheeseman Contract Carrier Application, 86 M.C.C. 176 (1961); Bowman Transportation, Inc., Extension - Florida, 107 M.C.C. 876, 880-882 (1968). The importance of operational feasibility as an essential prerequisite to a favorable finding as to the "fit, willing, and able" criteria of the statute was emphasized by the Commission in a General Policy Statement promulgated on November 15, 1973. 38 Fed. Reg. 32,856 (1973). Here there has been no showing that it is physically feasible for Mascony to operate where it proposes to. The routing of traffic which has been proposed shows cars moving through buildings which Mascony has no right to alter or remove, over gasoline tanks and sewer pipes which cannot support the weight of trucks and other vehicles proposed to be carried and through alleys and narrow, congested streets which are not wide enough for trucks of any size. J.A., Doc. 362.

However, the most serious operational defect in Mascony's proposal regards its terminal site at New London, where the automobiles loading and unloading must pass over high-speed railroad tracks located some 35 feet from the end of the pier. The grade crossing is not protected, and, indeed, there is no evidence that under the circumstances of use it could be protected in any meaningful way. The ICC effectively blocked the submission of any objective evidence of the ramifications of this problem when it denied Amtrak and the U. S. Department of Transportation leave to intervene. How is it feasible for Mascony to operate a ferry system while subjecting its passengers to such a horrendous risk is nowhere explained by the ICC or evident from the record in this case.

In view of the utter lack of evidence of the ability of Mascony to (1) operate to or from the port of Greenport or (2) load or unload passengers and vehicles at New London without those passengers and vehicles being subjected to extreme danger, the ICC acted arbitrarily and capriciously when it determined, in the absence of substantial evidence, that Mascony was able properly to provide the service here involved. Such arbitrary and capricious action is unlawful.

5 U.S.C. §706(2); Mississippi Valley Barge Line Co. v.

United States, 292 U.S. 282, 286-287 (1936); NLRB v. Minnesota Mining & Mfg. Co., 179 F. 2d 328 (8th Cir. 1950); Louisville & N. R.R. v. United States, 268 F. Supp. 71 (D. Ky 1967); Eastern Central Motor Carriers Ass'n v. United States, 239 F. Supp. 591 (D.D.C. 1965).

CONCLUSION

For the foregoing reasons, the grant of operating rights to Mascony was invalid. Accordingly, the Court should declare the orders which are the subject of this review proceeding to be unlawful and set them aside.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CROSS-SOUND FERRY SERVICES, INC.,

Petitioner,

v.

THE UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Respondents.

No. 77-4162

CERTIFICATE OF SERVICE

I hereby certify that I have this 27th day of October, 1977, served two copies of the Opening Brief of Petitioner and Incorporated Village of Greenport, The Bridgeport and Port Jefferson Steamboat Company and Shelter Island and Greenport Ferry Co. by first class mail, postage prepaid, upon the following:

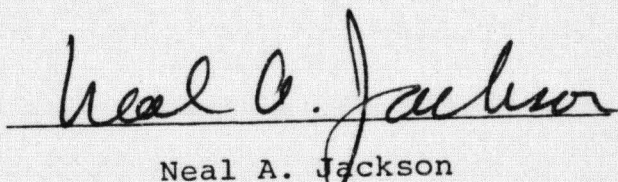
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